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November 18, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington DC 20554

Re: In the matter of Business Options, Inc., Order to Show Cause, EB-Docket No.
03-85, File No. EB-02-TC-151, NAL/Acct. No. 200332170002, FRN:
0007179054

Dear Ms. Dortch.

Enclosed for filing in the above-referenced docket are an original and six (6) copies of Business Options, Inc.'s Opposition to the Enforcement Bureau's Motion for Partial Summary Decision. Should you have any questions regarding this filing please do not hesitate to contact us.

Very truly yours,



Dana Frix
Kemal Hawa

Enclosures

cc: Hon. Richard L. Sippel (w/encls.)
David H. Solomon, Esq., FCC/Enforcement Bureau (w/encls.)
Maureen F. Del Duca, Esq., FCC/Enforcement Bureau (w/encls.)
James W. Shook, Esq., FCC/Enforcement Bureau (w/encls.)
Trent Harkrader, Esq., FCC/Enforcement Bureau (w/encls.)
Peter G. Wolfe, Esq., FCC/Enforcement Bureau (w/encls.)

No. of Copies Filed 0 + 6
List of Parties _____

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of) EB Docket No. 03-85
)
Business Options, Inc.) File No. EB-02-TC-151
) NAL/Acct. NO. 30033217002
Order to Show Cause and) FRN: 0007179054
Notice of Opportunity for Hearing)

To: Chief Administrative Law Judge
Richard L. Sippel

BUSINESS OPTIONS, INC.'S OPPOSITION
TO THE ENFORCEMENT BUREAU'S MOTION FOR PARTIAL SUMMARY
DECISION

Business Options, Inc. ("Business Options"), by its counsel, and pursuant to Section 1.251(b) of the Commission's rules, 47 C.F.R. § 1.251(b), hereby submits its response to the Enforcement Bureau's Motion for Partial Summary Decision (the "Motion"). Specifically, Business Options contends that the facts of this case will reveal that Business Options did not intentionally violate the Commission's rules with respect to each of the three issues on which the Enforcement Bureau seeks summary decision, *i.e.*, whether Business Options changed consumers' preferred carrier without authorization, failed to file its Telecommunications Reporting Worksheet, and discontinued service to customers in Vermont without Commission authorization.

Business Options further submits that the issue of whether Business Options technically violated the Commission's rules cannot be divorced from the issue of Business Options' intent. More specifically, the nature and gravity of any violations of the Commission's rules is what is truly at issue in this case. Thus, even if the Enforcement Bureau's Motion were granted, the same factual and legal issues would still have to be litigated to determine the nature and gravity of the violations, and what, if any, forfeiture would be appropriate. If, as we demonstrate below,

Business Options unintentionally violated the Commission's rules, it is entirely possible that no forfeiture penalty would be warranted, thus rendering any technical violations of the Commission's rules meaningless. Business Options contends that it would be far more appropriate to address these issues as a whole. The Motion should be denied.

We are not offering the facts, herein, to prove the truth of the matter asserted but rather for the purpose of demonstrating that there are material facts that remain open that directly bear on liability as a matter of law (and thus still must be litigated). For this reason we have not included affidavits in support of any contentions.

Introduction

On April 7, 2003, the Commission initiated the above-captioned proceeding to determine whether Business Options violated the Commission's rules, and if so, whether the Commission should revoke Business Options' operating authority or impose a forfeiture on the company. We believe that the Commission's extensive investigation to date, which has involved Business Options responding to more than 750 admissions requests, Enforcement Bureau attorneys reviewing the company's relevant files, and depositions of Business Options' current and former employees, have revealed that the Commission was mistaken in its tentative conclusion that Business Options made intentional misrepresentations or engaged in a lack of candor to the Commission, and that this fact is central to all facets of this case. Moreover, as Business Options demonstrates below, to the extent that it technically violated any of the Commission's rules, it did so due to a lack of sophistication regarding certain federal telecommunications regulations.

The issue of Business Options' intent is inextricable from each of the issues raised in the Motion and resolution of that issue requires an evidentiary hearing.

Background of the Case

Business Options is a small family-owned and operated Midwest long distance service provider out of Merrillville, Indiana. At the onset of this case the company had approximately 100 employees and had been in business for more than ten years. In the Spring of 2002, Business Options was contacted by the Vermont Board of Public Utilities (the "Vermont Board") regarding approximately twenty customer slamming complaints. Business Options stopped billing these customers in May of 2002, and continued to provide them with free long distance service through the end of 2002.

There was extensive communication between the Vermont Board and Business Options during the pendency of the Vermont dispute. The Vermont Board suggested to Business Options that it intended to initiate an adjudicatory proceeding to investigate the slamming complaints, and to determine whether fines should be imposed. Business Options had almost no presence in Vermont (it had a total of approximately 200 customers), and was losing money in the state monthly. Accordingly, the company made a business decision to exit the Vermont market rather than engage in litigation with the Vermont Board. Accordingly, in September of 2002, Business Options signed a voluntary stipulation with the Vermont Board agreeing to exit the state (the "Stipulation").

The correspondence between the Vermont Board and Business Options related to the Stipulation was amicable. Indeed, there is correspondence from the Vermont Board thanking the company for its cooperation, and welcoming the company to petition the Vermont Board for reinstatement once it is able to resolve its internal problems regarding its Vermont operations. The Stipulation itself is simple and straightforward, and contains no language suggesting that

Business Options engaged in misconduct. About a month later, the Vermont Board issued an order approving the Stipulation, and in that order made adverse findings of facts and conclusions of law that Business Options never agreed to, and that the record did not support. Business Options did not utilize counsel in its dealings with the Vermont Board and as a result did not challenge the order that was issued as being far outside of the scope of anything it agreed to in the Stipulation.

In October 2002, the Vermont Board sent Business Options a letter directing the company to initiate discontinuance procedures. The Vermont Board provided Business Options with a form discontinuance notice for the company to send to customers, and directed the company to give customers fifteen days' notice of the discontinuance of service. The form notice that the Vermont Board directed Business Options to use failed to comply with the Commission's rules in several respects, as did the Vermont Board's instruction that Business Options give customers fifteen days notice of discontinuance (the Commission's rules require 30 days' notice).

On November 1, 2002, the Commission sent Business Options a letter of inquiry ("LOI") requesting information regarding certain slamming accusations. Coincidentally, the officer of the company in charge of regulatory matters for Business Options for several years left the company on November 1, 2002 (he never received or read the LOI), and the LOI was inartfully responded to by a paralegal who had been on the job a matter of days, and who had no previous experience in the telecommunications industry or in dealing with regulatory agencies of any kind. She had no appreciation for the significance of the LOI, and thus did not bring it to the attention of the principals of the company in a meaningful way.

Meanwhile, responsibility for preparing the discontinuance application fell to another new employee of the company (the discontinuance application was one of her first projects) with no previous legal (or paralegal) experience, and with no previous experience of any kind in the telecommunications industry or in dealing with regulatory agencies. The record reflects that this employee made 19 calls to Commission staff in December to seek guidance. Commission staff forwarded this employee a Cable & Wireless discontinuance application to use as a form, and, except for name changes, the discontinuance application Business Options filed was virtually identical to the Cable & Wireless application provided.

The Commission looked unkindly upon both Business Options' response to the LOI, and the discontinuance application. On April 7, 2003, the Commission released its Show Cause Order, in which it stated that it was investigating four potential violations of its rules: 1) whether Business Options made misrepresentations or engaged in lack of candor in its response to the LOI or in its discontinuance application; 2) whether Business Options willfully or repeatedly slammed customers; 3) whether Business Options willfully or repeatedly failed to file FCC Form 499-A, and failed to pay universal service fees (an allegation added later); and 4) whether Business Options discontinued service in willful or repeated violation of the Commission's rules. Finally, the Show Cause Order states a determination should be made, based on the Commission's findings, whether Business Options' operating authority should be revoked and its principals ordered to cease and desist from the provision of interstate telecommunications services.

Argument

Business Options acknowledges that it has made certain mistakes. Through its cooperative efforts in this proceeding, however, Business Options has attempted to demonstrate to the Commission that any mistakes it made resulted from its lack of sophistication, which in certain instances included having individuals without telecommunications expertise or legal qualifications contacting Commission staff and making filings with the Commission.

We believe that in a hearing it is exceedingly unlikely that the Commission could prevail on the issue of misrepresentation or lack of candor, and Commission precedent provides little, if any, support for revocation of the operating authority of the company or its principals absent this issue.

In its Show Cause Order, the Commission alleged that Business Options made misrepresentations or violated its duty of candor to the Commission in two ways. First, through its inadequate response to the LOI, and second through a statement in its discontinuance application that it was discontinuing service in Vermont due to a reevaluation of its business plan.

As described above, because of the departure of the officer of Business Options in charge of regulatory affairs, both documents were prepared by new employees of the company with little or no legal experience, and who had no previous experience in the telecommunications industry or in dealing with regulatory agencies of any kind -- a fact which is reflected by the quality of the responses. Moreover, with respect to the discontinuance application, the language the Commission took issue with was duplicated wholesale out of the Cable & Wireless application provided to the company by Commission staff, and which Commission staff directed

Business Options to use as a form. Dispositive of this issue is the fact that Business Options' representation that it was discontinuing services due to a reevaluation of its business plan was true. As explained above, because of its minimal market presence in Vermont, the company decided to exit the Vermont market by voluntary stipulation rather than engage in protracted litigation with the Vermont Board.

Business Options has not made misrepresentations or violated its duty of candor to the Commission.

Slamming

Business Options has admitted to switching each of the eight customers at issue to Business Options' service without proper authorization. What is truly at issue, however, is not whether the Commission's slamming rules have technically been violated, but what Business Options' intent in doing so was. Each week, the Commission penalizes numerous interexchange carriers, including the nation's largest long distance providers, for slamming. This Commission imposes against such carriers its standard slamming remedy, which calls for reimbursement of 150% of amounts billed for the period in which they were slammed. The Enforcement Bureau contends that the nature and scope of Business Options' slamming violations are such that a significantly greater penalty beyond the standard remedy is appropriate, a fact which simply has not been demonstrated. The Enforcement Bureau must do so in an evidentiary hearing.

By way of background, each of the eight customers at issue affirmatively selected Business Options' service, and was properly verified (though there may have been technical deficiencies with the verifications themselves). Restitution was made to all of these customers long before the Commission issued its Show Cause Order, and indeed the record reflects that in

some instances customers received up to eight months of free service from Business Options during the pendency of their complaints. Thus, Business Options has already made restitution to customers in an amount that far exceeds the Commission's standard remedy for slamming complaints set forth in Section 64.1170 of the Commission's rules, which requires that customers be reimbursed 150% of amounts billed during the period in which they were slammed.

The Telecommunications Reporting Worksheet

Business Options admits that it has not filed a Telecommunications Reporting Worksheet (FCC Form 499), a fact easily confirmed by anyone searching the Commission's public records. The former officer of the company in charge of regulatory matters testified that he had sole responsibility for Business Options' regulatory compliance, and that he was simply unaware of the filing requirement. Accordingly, Business Options has not paid into the federal universal service fund.

Again, what is relevant here is Business Options' intent in failing to file its Telecommunications Reporting Worksheet. The Enforcement Bureau is seeking a forfeiture penalty against Business Options that is more than ten times greater than the forfeiture penalty assessed on similarly situated carriers, but has not set forth any facts relative to the nature and gravity of Business Options' reporting failures. In other cases involving the failure to file Telecommunications Reporting Worksheets, carriers were well aware of their obligation to file but did not. In this case, the record will reveal that Business Options was unaware of its obligation to file, a fact essential to disposition of this issue.

Discontinuance

Business Options' discontinuance actions were taken in specific reliance on the state of Vermont's instructions. Although the Vermont Board directed Business Options to send a discontinuance notice to customers, the sample discontinuance notice the Vermont Board directed Business Options to use failed to comply with the Commission's rules. The Vermont Board also required that Business Options give customers fifteen days notice of discontinuance. The Commission's rules require 30 days' notice. Thus, even if Business Options technically violated the Commission's rules, it did so in specific reliance on a state regulatory authority's instructions. It is unclear how long customers actually received service from Business Options after the notice was sent, though it appears that customers received service for at least fifteen days.

In short, Business Options neither willfully nor repeatedly violated the Commission's discontinuance rules as contended by the Enforcement Bureau. As demonstrated above, Business Options discontinued its service in specific reliance on the Vermont Board and the Commission's instructions. To the extent that that reliance was misplaced, Business Options' failure to comply with the Commission's rules cannot be deemed willful. Moreover, Business Options only discontinued service in Vermont one time, and thus its actions were not repeated.

Conclusion

For the foregoing reasons, Business Options submits that the Enforcement Bureau's Motion should be denied.

Business Options, Inc.
Opposition to Motion for Partial Summary Decision
November 18, 2003

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Dana Frix", written over a horizontal line.

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Counsel for Business Options, Inc.

November 18, 2003

CERTIFICATE OF SERVICE

I, Claudia F. Torres, hereby certify that true and correct copies of the foregoing Business Options, Inc.'s Opposition to the Enforcement Bureau's Motion for Partial Summary Decision were sent by hand delivery to the following individuals on this 18th day of November, 2003.


Claudia F. Torres

Copies to:

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